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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

GERRY L. RODE,

Plaintiff and Respondent.

v.

FRONT RANGE MOTORCYCLES, INC.,

Defendant and Appellant.

2d Civil No. B206562
(Super. Ct. No. 1188050)
(Santa Barbara County)

Respondent Gerry L. Rode's corporation, Bad to the Bone, Inc., owned and operated a motorcycle dealership. It sold four motorcycles to appellant Front Range Motorcycles, Inc. (FRM). FRM accepted delivery of the motorcycles but then refused to pay for them. Bad to the Bone sold the dealership and ceased business operations. Bad to the Bone assigned to Rode all claims arising from the sale of the dealership. Rode filed a complaint for breach of contract against FRM. FRM moved to dismiss the complaint on the ground that Rode lacked standing to sue because Rode's corporation was suspended at the time the assignment was made and the assignment was void *ab initio*. The court denied the motion finding that the assignment was not void, Rode had standing to sue, and FRM failed to timely assert the defense of lack of capacity to sue. We affirm.

FACTS AND PROCEDURAL HISTORY

Rode was the president, chief executive officer and majority shareholder of Bad to the Bone, Inc., a California corporation (BTB). BTB owned and operated a Harley-Davidson motorcycle dealership in Santa Barbara. The dealership was the sole business operation of BTB.

In early 2002, Rode agreed to sell the dealership to a third party not involved in this lawsuit. Escrow closed on the sale on March 15, 2002. Shortly before escrow closed, BTB agreed to deliver four used motorcycles to appellant FRM, a Harley-Davidson dealership in Denver, Colorado, for \$30,000. FRM accepted delivery of the motorcycles but then refused to pay for them on the ground that they were either damaged or not as represented.

On July 18, 2002, the California Secretary of State suspended the corporate powers, rights and privileges of BTB pursuant to Corporations Code section 2205 for failure to file an annual statement. On May 1, 2003, the Franchise Tax Board suspended the corporate powers, rights and privileges of BTB pursuant to Revenue and Taxation Code section 23301 for failure to pay taxes.

On December 31, 2003, the shareholders of BTB adopted resolutions assigning to Rode "all right, title and interest in any legal claim(s) of any kind associated with the Corporation's sale of its motorcycle dealership [to the third party]."

On March 2, 2006, Rode, as the assignee and successor-in-interest to BTB, filed a complaint against FRM for breach of contract and common counts arising from FRM's failure to pay for the four motorcycles. FRM filed an answer on May 9, 2006, setting forth the affirmative defense that Rode lacked standing to sue. FRM filed an amended answer on March 7, 2007, reasserting the defense of lack of standing to sue. Trial was set for April 4, 2007, and continued to August 24, 2007.

Ten days before trial, FRM filed a motion to dismiss the complaint raising for the first time the defense of lack of capacity to sue. FRM also contended the assignment from BTB to Rode was void *ab initio* because, at the time the assignment was made, BTB's corporate status was suspended. Rode opposed the motion on the grounds

(1) he had standing to sue because a suspended corporation may enter into contracts pursuant to Revenue and Taxation Code section 23304.1 and that such contracts are voidable at the behest of the contracting party, and (2) FRM waived its right to assert the defense of lack of capacity to sue by failing to raise it as a plea in abatement at the earliest opportunity. The trial court denied the motion on the grounds asserted by Rode. The court also found that it was not in the interests of judicial economy to further delay the trial for revival of the corporation.

At the conclusion of a bench trial, the trial court found that FRM had breached its contract with Rode and awarded \$30,000 in damages.

In this appeal FRM contends that Rode lacks standing to pursue a claim assigned to him by a suspended corporation and the assignment to Rode did not include a claim for breach of contract against FRM.

DISCUSSION

The Assignment Was not Void and Rode Had Standing to Sue

Revenue and Taxation Code section 23304.1 states that a contract entered into by a corporation while its corporate powers have been suspended is "voidable at the instance of any party . . . other than the taxpayer." (See *White Dragon Productions, Inc. v. Performance Guarantees, Inc.* (1987) 196 Cal.App.3d 163, 172 [". . . A voidable contract is one which may be rendered null at the option of one of the parties, but is not void until so rendered . . ."].) Under the statute, Rode had the power to void the assignment.

FRM contends, nonetheless, that the assignment was void *ab initio* because Rode's corporation also was suspended under the Corporations Code at the time of the assignment and the Corporations Code contains no provision permitting a corporation to enter into contracts. Corporations Code section 2205, subdivision (c) states that if a corporation does not file an annual statement within 60 days of being notified to do so, the Secretary of State shall notify the Franchise Tax Board of the suspension and "thereupon, the corporate powers, rights, and privileges of the corporation are suspended"

The lack of a provision in the Corporations Code making contracts voidable if entered into by a suspended corporation does not mean that a corporation suspended under the Corporations Code is prohibited from entering into contracts. Under accepted rules of statutory construction, a statute must be construed in the context of the entire statutory scheme of which it is a part. (*People v. Hull* (1991) 1 Cal.4th 266, 272.) We must interpret statutes in such a way as to make them consistent with each other, rather than obviate one another. (*Nickelsberg v. Workers' Comp. Appeals Bd.* (1991) 54 Cal.3d 288, 298.) We also must construe statutes to avoid absurd results. (*People v. Davis* (2003) 104 Cal.App.4th 1443, 1448.) If we accepted FRM's interpretation of the statute, we would be violating all three of these principles.

The language of Corporations Code section 2205, subdivision (c) stating that failure to file an annual statement results in suspension of the corporation's powers, rights and privileges, is substantially similar to that of Revenue and Taxation Code section 23301 which states: "Except for the purposes of filing an application for exempt status or amending the articles of incorporation as necessary either to perfect that application or to set forth a new name, the corporate powers, rights and privileges of a domestic taxpayer may be suspended" if it fails to pay its taxes. The language of suspension in the Revenue and Taxation Code, if read in isolation, is as absolute as that in the Corporations Code. Despite this seeming absolute limitation on corporate powers, however, Revenue and Taxation Code section 23304.1 acknowledges that a suspended corporation is not prohibited from entering into contracts. As the Corporations Code and Revenue and Taxation Code provisions deal with the same subject matter and contain almost identical language, we must harmonize them. To do so, we construe the disability imposed on suspended corporations by Corporations Code section 2205, subdivision (c), to be the same as that imposed by Revenue and Taxation Code section 23304.1. Thus, a corporation suspended under the Corporations Code is not prohibited from entering into contracts during its suspension. If it does so, then the contract is merely voidable, not void. Rode chose not to exercise his right to void the assignment; therefore, the assignment is valid and Rode had standing to pursue the claim against FRM. Any other

construction would lead to an absurd result, imposing a greater disability on a corporation for the relatively minor sin of failing to file an annual statement than on a corporation who commits the more egregious offense of failing to pay its taxes. Our interpretation is consistent with that of the court in *Palm Valley Homeowners Ass'n, Inc. v. Design MTC* (2000) 85 Cal.App.4th 553, 561, which concluded that "a corporation suspended under the Corporations Code is *equally disabled from* acting as a corporation suspended under the Revenue and Taxation Code." (Italics added.)

*FRM Waived the Defense of Lack of Capacity to Sue
By Failing to Raise it in a Timely Manner*

The only viable defense against a suspended corporation's right to litigate is a timely plea in abatement. (*Traub Co. v. Coffee Break Service, Inc.* (1967) 66 Cal.2d 368, 370; *Color-Vue, Inc. v. Abrams* (1996) 44 Cal.App.4th 1599, 1604.) FRM's assertion of the defense of lack of standing to sue in its answer is not a substitute for asserting lack of capacity to sue. As explained in *Color-Vue*, at page 1604: "'There is a difference between the *capacity* to sue, which is the right to come into court, and the *standing* to sue, which is the right to relief in court.' [Citation.] 'Incapacity is merely a legal disability, such as infancy or insanity, which deprives a party of the right to come into court. The right to relief, on the other hand, goes to the existence of a cause of action. It is not a plea in abatement, as is lack of capacity to sue.' [Citation.] Our Supreme Court has specifically stated that 'a plea of lack of capacity of a corporation to maintain an action by reason of a suspension of corporate powers for nonpayment of its taxes "is a plea in abatement which is not favored in law [and] is to be strictly construed" [Citation.] [¶] The distinction is significant because a plea in abatement such as lack of capacity to sue 'must be raised by defendant at the earliest opportunity or it is waived. . . . The proper time to raise a plea in abatement is in the original answer or by demurrer at the time of the answer. [Citation.] It is a technical objection and must be pleaded specifically.' (Fn. omitted.)

As the assignee of a suspended corporation, Rode was subject to the defense of lack of capacity to sue. (See *Johnson v. County of Fresno* (2003) 111

Cal.App.4th 1087, 1096 [". . . The assignee "stands in the shoes" of the assignor . . . subject to *any defenses* which the *obligor* has against the assignor . . ."].) FRM did not raise the defense until 10 days before trial. The plea is not timely and the defense was waived.

FRM asserts that permitting Rode to litigate his claim against FRM without reviving the corporation and paying its taxes is contrary to the public policy. We disagree. FRM was required to, but did not, raise the defense of lack of capacity until the eve of trial. BTB was a defunct corporation which conducted no business after its sale of the dealership in March 2002. There is no evidence in the record that BTB avoided paying its taxes prior to that time.

Moreover, even if any of FRM's contentions concerning the effect of BTB's suspension had merit, we would not reverse the judgment for the reasons stated in our opinion in *Gardiner Solder Co. v. Supalloy Corp., Inc.* (1991) 232 Cal.App.3d 1537. In that case, as here, a party to a contract with a corporation suspended under Revenue and Taxation Code section 23301 for failure to pay its taxes attempted to avoid payment under the contract by arguing that the corporation previously violated the tax code. We rejected the argument and held that the corporation was entitled to payment under the equitable remedy of restitution. We said: "Because the purpose of these tax code sections is simply to ensure collection of tax revenue and not to punish the noncomplying party, SupAlloy cannot successfully obtain a trial court declaration that the contract is 'void' and retain goods to which it has no ownership interest. . . . [¶] . . . [T]here are no public policy reasons which support punishment of Gardiner by forfeiture of its property or a windfall to SupAlloy. The Legislature did not intend the statutes to permit the instant windfall. There is no logical reason to permit SupAlloy to retain the solder. Such a result would be more than simply unfair, it would be unconscionable resulting in unjust enrichment to SupAlloy. Common sense compels the conclusion that Gardiner should receive restitution." (*Id.*, at pp. 1542-1543, fn. omitted.)

Here, as in *Gardiner*, FRM never attempted to return the motorcycles. It simply kept them and withheld payment. The judgment against FRM for the price of the motorcycles was fair and equitable.

The Assignment Included the Claim Against FRM

FRM argues that the assignment from BTB to Rode did not include the claim against it for breach of contract. The argument is without merit. The language of the assignment --"all right, title and interest in any legal claim(s) of any kind associated with the Corporation's sale of its motorcycle dealership"-- while not expressly mentioning the claim against FRM, is broad enough to encompass it. (See Webster's New Collegiate Dict. (1994) p. 70 [defining "associated" as "closely connected" or "closely related"].) Rode's sale of the four motorcycles to FRM was done only days before escrow closed on the sale of the dealership and, thus, was "associated" or "closely connected" in time to the sale of the dealership. As the trial court said: "The document speaks for itself."¹

The judgment is affirmed. Respondent shall recover costs.

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PERREN, J.

We concur:

YEGAN, Acting P.J.

COFFEE, J.

¹ Because the document was clear on its face, the trial court did not err in not permitting FRM to cross-examine Rode concerning the meaning of the assignment.

James W. Brown, Judge
Superior Court County of Santa Barbara

Benton, Orr, Duval & Buckingham, Kevin M. McCormick and Maureen Houska for Defendant and Appellant.

Law Office of Mark R. Wietstock and Mark R. Wietstock for Plaintiff and Respondent.